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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1428

ANTHONY M. PUCHALSKI,

Petitioner,

—v.—

NEW JERSEY STATE PAROLE BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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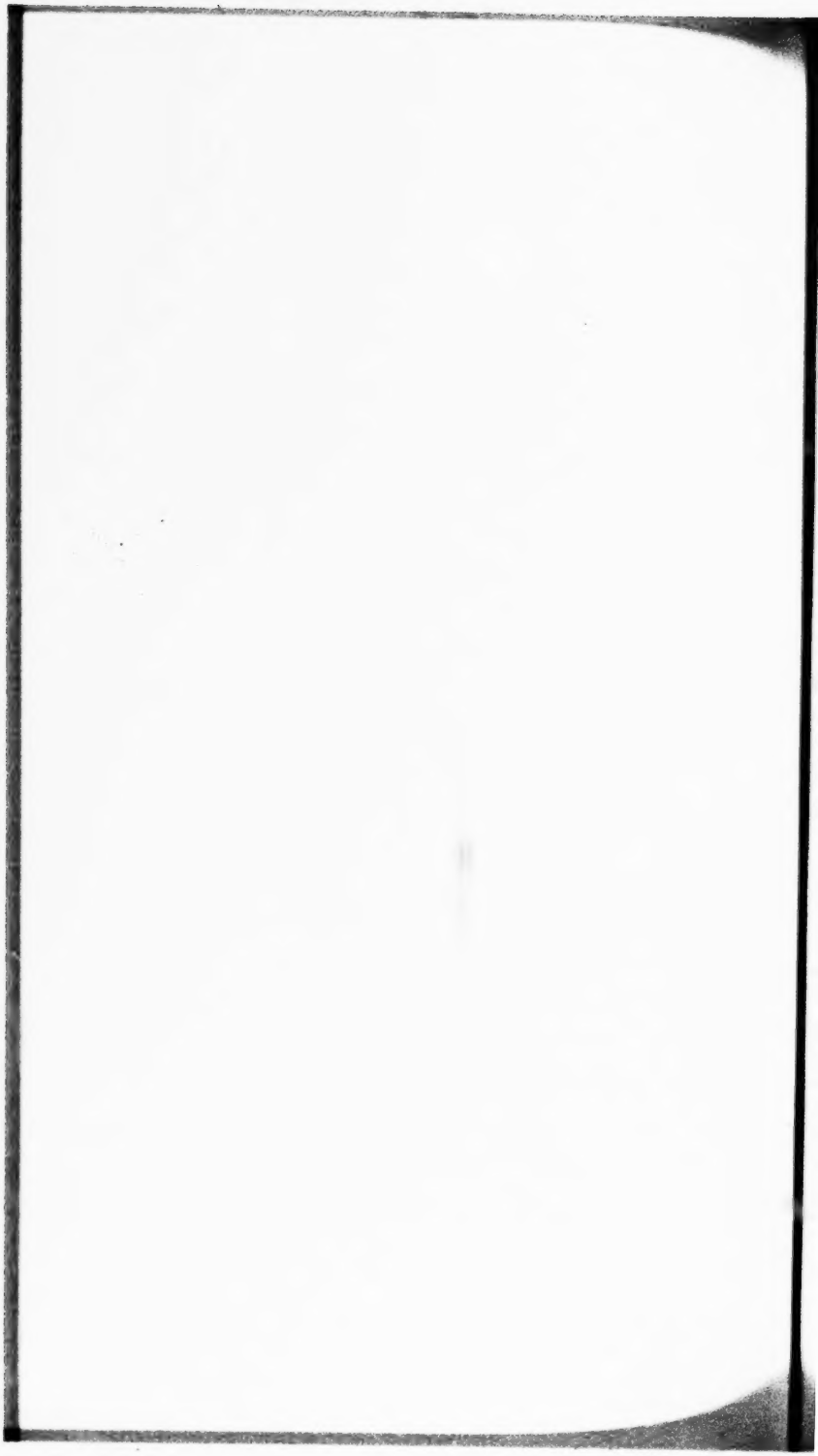

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Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

ANTHONY M. PUCHALSKI,

Petitioner,

—v.—

NEW JERSEY STATE PAROLE BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on December 16, 1969.

Citations to Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 104 N.J. Super. 294 and appears in the Appendix, *infra,* at pp. 20-27. The opinion of the Supreme Court of New Jersey is reported at 55 N.J. 113 and appears in the Appendix, *infra,* at pp. 17-19.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on December 16, 1969. Thereafter on March 12, 1970 an extension of time was granted by Mr. Justice

Brennan until April 15, 1970 in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Question Presented

Whether a state, having provided by statute for the assistance of counsel in connection with parole proceedings can, consistent with the equal protection clause, deny that right to applicants who are indigent?

Statute Involved

New Jersey Statutes Annotated, Section 30:4-123.25 provides, in pertinent part, as follows:

> When it becomes necessary for a prisoner to appear before the board, either for the purpose of determining his fitness for parole or to afford him an opportunity to be heard as to revocation of parole, such hearing shall be conducted in accordance with the rules and regulations of the board, but the prisoner shall have the right to consult legal counsel of his own selection, if he feels that his legal rights are invaded, and subject to the consent of the board to submit in writing a brief or other legal argument on his behalf to the parole board, and to have the services of an interpreter at his hearing if such services are necessary. The board, however, may call before it such witnesses as it may deem necessary and proper and in order to compel their attendance, shall be vested with the power of subpoena. . . .

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Statement of the Case

Petitioner, Anthony M. Puchalski, is serving a sentence of 29 to 30 years at the New Jersey State Prison in Trenton following a conviction of murder in the second degree. See *State* v. *Puchalski,* 45 N.J. 97 (1965).

Sometime prior to December 1, 1967, petitioner was notified that he would shortly be eligible for consideration for release on parole and that he was scheduled to appear before the parole board in March, 1968 (App., *infra,* p. 20). The purpose of this hearing was to decide whether and under what conditions petitioner would be released on parole. See N.J.S.A. §§30:4-123.5, 30:4-123.25. After receiving this notification, petitioner wrote the Office of the Public Defender and the Chairman of the Parole Board indicating that he was indigent and requesting that an attorney be appointed to represent his interests before the parole board (Record of Proceeding Under Review, 1A).[1] Petitioner was advised by letters dated December 8, 1967 and December 11, 1967 that neither organization would comply with his request, the Parole Board Chairman stating that the board was "not empowered to make such arrangements" (Record, p. 2 and pp. 1a-2a).

On January 9, 1968 an additional application was made on petitioner's behalf to the Office of the Public Defender enclosing an Application for the Assignment of Defense Counsel Pursuant to Supreme Court Rule 1:12-9 which

[1] The record from the court below consists of six separate items. The first one is entitled "Record of Proceedings Under Review," hereinafter referred to as "Record." The others are entitled "Notice of Appeal to the Supreme Court," "Motion by Respondent to Dismiss Appeal," "Statement in Lieu of Brief in Opposition to Respondent's Motion to Dismiss Appeal," "Order Holding Motion," and "Opinion" and will hereinafter be referred to as such.

requested that office to provide petitioner with the limited representation specifically allowed in N.J.S.A. 30:4-123.25 (Record, 2A; App., *infra,* p. 21). Such representation would have included consultation with counsel prior to the parole hearing and submission by counsel of a brief or other legal argument to the parole board on petitioner's behalf. The Public Defender's Office replied to this request on January 30, 1968, refusing to undertake the form of representation requested because, in their opinion, it was not authorized by the statute establishing the Office of the Public Defender (Record, 2A; App., *infra,* p. 21).

On February 20, 1968 petitioner appeared before the State Parole Board (Record, 3a; App., *infra,* p. 21). He was subsequently notified that parole had been denied regardless of the availability of a suitable parole plan and that his case was scheduled for rehearing in February, 1970 (Record, 3a). Petitioner had no opportunity to consult with legal counsel prior to the hearing. No brief was submitted nor was a legal argument on his behalf made to the Parole Board. It has been stipulated between the parties that petitioner is an indigent and "is unable to obtain funds from anyone, including his family and associates, in order to obtain and to compensate private counsel to represent him before the parole Board" (Stipulation of Facts in Record).

Thereafter, an action to review the Parole Board's decision was brought in the Superior Court of New Jersey, Appellate Division. In an opinion filed on January 20, 1969 the Superior Court of New Jersey, Appellate Division, upheld the actions of the Parole Board in refusing to assign counsel and in denying parole (Record; App., *infra,* pp. 20-27). A timely appeal was then taken to the Supreme

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Court of New Jersey which on December 16, 1969 filed its opinion affirming the judgment of Superior Court (Opinion; App., *infra*, pp. 17-19).

The issues presented herein were raised throughout the proceedings in the state courts by advancing them in briefs and arguments to the Superior Court, Appellate Division (Record; App., *infra*, p. 20) and the Supreme Court of New Jersey (Opinion; App., *infra*, p. 17). The opinions below manifest that these issues were ruled upon. The New Jersey Supreme Court rejected petitioner's contentions, holding that the assistance of counsel authorized by statute was not of sufficient importance to require that the state appoint counsel for those parole applicants unable to retain an attorney to represent them in connection with parole board hearings.

Reasons for Granting the Writ

The substantial question presented by this petition is whether the states can provide a significant procedural right in connection with parole proceedings and then discriminatorily withhold its exercise from those prisoners who are financially incapable of obtaining it. The decision below held such discrimination to be constitutionally tolerable. This Court's decisions from *Griffin* v. *Illinois*, 351 U.S. 12 (1956) to *Williams* v. *City of Oklahoma City*, 395 U.S. 458 (1969) compel the conclusion that it is not. While not involving the precise question raised here, those rulings clearly demonstrate that even though a state-created right might not be constitutionally required, nevertheless when a man's freedom is at stake, that right cannot be conditioned on his ability to pay for it. The decision below is not in accord with this essential principle.

I.

The failure to provide counsel for indigent prisoners in connection with parole hearings, while allowing legal representation to those who can afford to retain counsel, effects a denial of equal protection of the laws.

By statute, New Jersey has established the right of an applicant for parole to a hearing before the Parole Board. In connection with that hearing, New Jersey has further provided that "the prisoner shall have the *right* to consult legal counsel of his own selection, and subject to the consent of the board to submit in writing a brief or other legal argument to the parole board. . . ." N.J.S.A. 30:4-123.25 (emphasis added). Petitioner chose to exercise that "right to consult legal counsel" in connection with his March 1968 parole hearing. But because of his indigence he was unable to retain counsel, and the parole board refused to arrange to have counsel appointed. Thus, New Jersey has a statutory arrangement whereby it affords the right of counsel to those able to afford it, but withholds it to all indigent prisoners. Such discrimination is constitutionally intolerable.

For fifteen years, beginning with *Griffin* v. *Illinois*, this Court has made it absolutely clear that it will not sanction discrimination between indigents and those who possess the means to protect their rights. The Court's concern with invidious discrimination in the ability to pursue legal rights has not been limited to whether the indigent receives any access to counsel or to a transcript for appeal. It has included a concern with the quality of that access. *E.g.*, *Anders* v. *California*, 386 U.S. 748 (1967). This equal pro-

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tection doctrine was described as follows, in a decision holding an indigent entitled to a free transcript of a preliminary examination:

> Our decisions for more than a decade now have made clear that *differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.* See, e.g., Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). Only last Term, in Long v. District Court of Iowa, 385 U.S. 192 (1966), we reiterated the statement first made in Smith v. Bennett, 365 U.S. 708, 709 (1961), that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Roberts* v. *LaVallee,* 389 U.S. 40 (1967) (emphasis added). See also, *United States ex rel. Wilson* v. *McMann,* 408 F.2d 896 (2d Cir. 1969).

Many courts have applied this broad principle to the procedures surrounding the parole decision, indicating that while the state or federal government may not be required to afford particular procedures or rights in connection with parole decisions, when they have done so, they cannot deprive the indigent of those benefits. *Earnest* v. *Willingham,* 406 F.2d 681 (10th Cir. 1969), involved the denial of assigned counsel to an indigent person whose federal mandatory release was being revoked. The relevant statute, 18 U.S.C. 4207, which provided a prisoner with an "opportunity to appear," had been administratively interpreted to allow counsel to those who could "arrange" for it. 28

C.F.R. 2.41. Chief Judge Murrah, writing for the Court, indicated that he would not have interpreted the statute in that manner, but once this had been done, the issue changes:

> But at issue here is the question whether an agency of the Federal government can administratively afford counsel at revocation hearings to those financially able to retain one while refusing appointed counsel to those financially unable. To pose the question is to answer it, for Griffin and its progeny have made it clear beyond doubt that where liberty is at stake a State may not grant to one even a non-constitutional, statutory right such as here involved and deny it to another because of poverty. 406 F.2d at 683-84. See also, *Wilkerson* v. *Patterson,* 303 F. Supp. 665 (D. Col. 1969); *Donnell* v. *Swenson,* 302 F. Supp. 1024 (W. D. Mo. 1969).

Accordingly, the Court ruled that "so long as the Board allows retained counsel at revocation hearings it must provide such for those financially unable to hire one." 406 F.2d at 684. *Compare, Williams* v. *Patterson,* 389 F.2d 374 (10th Cir. 1968). See also, *Jones* v. *Rivers,* 338 F.2d 862, 875-879 (4th Cir. 1964) (concurring opinions); *Hyser* v. *Reed,* 318 F.2d 225, 254-55 (D. C. Cir.) (dissenting opinion), *cert. denied,* 375 U.S. 957 (1963).

At least two state courts have reached a similar conclusion. In *Commonwealth* v. *Tinson,* 249 A.2d 549 (1969), the Pennsylvania Supreme Court ruled that there was a right to counsel at a parole revocation hearing which "may determine on which side of the prison walls appellant will be residing" and, further, that counsel had to be appointed for those parolees who could not afford to retain one.

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Similarly, the Supreme Court of Alaska interpreted its statutory provision for counsel at probation revocation to require that, consistent with the equal protection clause, counsel be assigned to indigent probationers. *Hoffman* v. *State of Alaska,* 404 P.2d 644 (1965).

In sum, the ruling below is in conflict with the principle that "where the permitted activities of retained counsel are of substantial benefit to his client" the equal protection clause requires counsel to be appointed for the indigent. *Wilkerson* v. *Patterson, supra* at 667. The State of New Jersey has provided a system for determining whether to grant parole, has afforded the right to counsel in connection with that determination, but has held that counsel can be denied to indigent prisoners. As will be demonstrated *infra,* the right to counsel in this context is of sufficient substance so that equal protection will not allow it to be discriminatorily withheld from the prisoner without funds.

II.

The right to counsel in connection with parole hearings is of sufficiently substantial benefit that its exercise cannot be conditioned upon the prisoner's ability to afford retained counsel.

The court below concluded that the assistance of counsel in seeking parole is not of such importance and does not involve the determination of such factual and legal questions as to require the state to supply an attorney to those unable to pay for one (App., *infra,* p. 18).

This Court has long recognized that determinations as to sentence, probation and parole can be as important to the convicted defendant as the initial decision regarding

guilt or innocence. Indeed, the length of incarceration is often effectively determined by parole boards. See *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Williams* v. *New York*, 337 U.S. 241 (1949); *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Accordingly, much judicial and scholarly attention has been given to the general problem of what procedures should surround the parole decision. There has been a retreat from the traditional notion that parole is a matter of grace which can be administered in an arbitrary and discriminatory fashion. See, *e.g.*, *Boddie* v. *Weakley*, 356 F.2d 242 (4th Cir. 1966); *Hyser* v. *Reed*, 318 F.2d 225 (D. C. Cir. 1963) (en banc); *United States ex rel. Vance* v. *Kenton*, 252 F. Supp. 344 (D. Conn. 1966); *Commonwealth* v. *Tinson, supra;* cf., *Goldberg* v. *Kelly*, —— U.S. ——, 38 U.S. Law Week 4223 (Mar. 24, 1970); see generally Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa* v. *Rhay*, 47 Tex. L. Rev. 1 (1968); Comment, *Constitutional Law: Parole Status and the Privilege Concept*, 1969 Duke L. J. 139 (1969).

This Court's decision in *Mempa* v. *Rhay, supra*, holding that there is a right to counsel at a proceeding which results in the revocation of probation, has prompted further examination of the issues. In the wake of *Mempa*, there has been much dispute over whether that decision constitutionally requires counsel at parole revocation proceedings. *Compare Commonwealth* v. *Tinson, supra*, with *Johnson* v. *Stucker*, 203 Kan. 253, *cert. denied*, 38 U.S. Law Week 3173 (Nov. 10, 1969).[2]

[2] Analytically, the decisions either to grant or to revoke parole are essentially the same and are quite similar to the initial sentencing decision. Both kinds of parole decisions can involve fact-finding and predictions, and of course both determine whether the parolee or prisoner will be in prison or at liberty. See generally, Cohen,

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Whatever the merits in this controversy over which procedures are constitutionally mandated in connection with parole decisions, the instant case does not involve such broad considerations. To decide this case the Court need not rule on whether the Sixth Amendment or the due process clause of the Fourteenth requires the assistance of counsel in connection with parole board determinations. Rather, the issue turns on whether the right to counsel provided for by New Jersey in connection with parole proceedings is of sufficiently substantial benefit to the prisoner to require that it be made available to all prisoners. *Compare Earnest* v. *Willingham, supra,* with *Wilkerson* v. *Patterson, supra.* In the New Jersey parole scheme, as reflected in the facts of this case, the assistance of counsel is of substantial benefit.

The decision-making process of the State Parole Board is fairly elaborate. Pursuant to N.J.S.A. 30:4-123.7, the Department of Institutions and Agencies and the chief executive officers and staffs of the state penal and correctional institutions furnish the Parole Board with all pertinent information and data about the prisoner while under sentence, available information about his prior record in the community from which he was committed, and a complete report of his social, physical, mental and psychiatric condition and history. The chief executive officer, warden or keeper of the prisoner's institution must furnish the Parole Board with a detailed statement of the applicant's institutional record, behavior, discipline

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Sentencing, Probation and the Rehabilitative Ideal, supra; Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803 (1961). Indeed, the statute here in question applies to both parole grant and revocation.

and attitudes. See N.J.S.A. §30:4-123.18. In addition to this information, the Board receives a report from at least one of its own members giving his views and recommendations, N.J.S.A. §30.4-123.18, and is empowered to make whatever investigation it deems "necessary and proper." N.J.S.A. §30:4-123.9. At the parole hearing, the Board must interview the prisoner and verify the information it has received from other sources, N.J.S.A. §30:4-123.19. The Board may also subpoena witnesses to appear before it. N.J.S.A. §30:4-123.25. These procedures are directed toward the Board's determination whether there is a "reasonable probability" that the applicant "will assume his proper and rightful place in society." N.J.S.A. §§30:4-123.19, 30:4-123.14.

Thus, the Board's determination is based on a wealth of factual material which it must weigh and evaluate. It has the power to investigate and subpoena witnesses. And it must afford the parole applicant or parolee a hearing on the issue. In many ways this decision-making process is similar to the initial sentencing determination in New Jersey.

Many of the same functions which counsel performs with regard to sentencing, see *Mempa* v. *Rhay, supra,* can be undertaken in connection with the parole hearing. First, counsel can help determine the accuracy of adverse information presented to the Board. Cf. *Townsend* v. *Burke, supra; Boggess* v. *Boles,* 251 F. Supp. 689 (N.D. W.Va. 1966). While New Jersey technically does not allow access to the reports on which the Parole Board acts, see *Mastriani* v. *New Jersey Parole Board,* 95 N.J. Super. 351, 356 (App. Div. 1967), *compare, State* v. *Kunz,* 38 Law Week 2402 (January 27, 1970, N.J. Supreme Court)

(holding a defendant is entitled to review the pre-sentence report and rebut any prejudicial matter), nevertheless counsel could investigate for the applicant, submit a memorandum for the Board's consideration, suggest witnesses whom the Board might subpoena, and prepare the parole applicant to rebut any allegation of misconduct at the hearing. In addition to correcting prejudicial misinformation, counsel can employ these same tools to emphasize all the facts favorable to the application. See generally, Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process, supra* at 829. In addition to aiding the applicant in the presentation of facts, counsel can apprise him of the rules and regulations governing Parole Board determinations. Of course, counsel can submit a brief to the Board on the applicable rules and principles.

It is thus apparent that the right to consult with counsel provided in N.J.S.A. §30:4-123.25 can be of substantial value to the parole applicant especially where, as here, there appear to have been allegations that the applicant committed serious criminal acts in prison.[3] These alleged offenses were not mere infractions of parietal rules; to the best of local counsel's recollection, they included an attempted prison escape, the stabbing of a prison guard, and the possession on frequent occasions of razor blades. Yet no criminal charges have been brought. Indeed, the very gravity of these charges, when coupled with the absence of any prosecution, casts serious doubt

[3] At oral argument before the Appellate Division, the Board's attorney read a list of alleged offenses, presumably to argue that with or without counsel, petitioner would not have been granted parole. Local counsel has been unable to secure a copy of the list.

on their credibility. But they will remain in petitioner's file to bar his parole again and again.

In failing to recognize the importance of counsel in connection with the parole decision, the courts below reflect the attitude that the states, having erected a parole system purportedly premised on benevolence, are free to administer such a system in an arbitrary manner.[4] But as this Court noted with regard to an analogous system premised on the exchange of fair procedures for good intensions, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In Re Gault,* 387 U.S. 1, 18 (1967).

[4] In 1961 it was reported that at least 18 states permitted the assistance of counsel either in preparation for the parole hearing or at the hearing itself. Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process, supra* at 814. It is uncertain how many of these states provide counsel for the indigent prisoner.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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April 13, 1970

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

A-44 September Term, 1969

ANTHONY PUCHALSKI,

Plaintiff-Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Defendant-Respondent.

The opinion of the Court was delivered

PER CURIAM.

The plaintiff, an indigent prisoner, brought this action to review the denial of assignment of counsel to represent him in connection with a parole release consideration hearing.

The Parole Board may release a prisoner on parole only if "it is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." *N.J.S.A.* 30:4-123.14. In connection with his appearance at the Board hearing to determine such fitness (*N.J.S.A.* 30:4-123.19), "the prisoner shall have the right to consult legal counsel of his own selection, if he feels that

his legal rights are invaded, and subject to the consent of the board to submit in writing a brief or other legal argument on his behalf . . . ." *N.J.S.A.* 30:4-123.25. Being financially unable to hire counsel for this purpose, plaintiff contends that the refusal to assign him an attorney violates equal protection and due process.

The Appellate Division upheld the denial, finding that the aid of counsel in seeking a parole is not of such importance and does not concern the determination of such factual or legal questions as to require the state to supply an attorney to those unable to pay for one, and that consequently no constitutional right of plaintiff had been infringed. 104 *N.J. Super.* 294 (1969). His appeal to this Court is on the basis that a substantial constitutional question is involved. *R.* 2:2-1(a)(1).

We agree with the Appellate Division and affirm for the reasons given in its opinion. *Mastriana* v. *New Jersey Parole Board,* 95 *N.J. Super.* 351 (App. Div. 1967), where it appears that court-assigned counsel advised the appellant prisoner at a consent rehearing before the Board, is not authority to the contrary in view of the peculiar situation present in that case. Nor does *R.* 2:7-2(a), providing for the assignment of the Public Defender as counsel for an indigent where a review of administrative proceedings concerning status as a prisoner is sought, extend to a parole release consideration hearing before the Board. Its intended scope otherwise need not be considered here.

We should add that we express no view on the intimation by the Appellate Division (104 *N.J. Super.* at 301) that an indigent parolee might be entitled to the assignment of counsel in connection with a proceeding to *revoke* parole. (*N.J.S.A.* 30:4-123.25 covers the right to counsel for such a proceeding in the same language as that quoted above with

reference to parole release.) While the constitutional right to the assignment of counsel where *probation* is sought to be revoked seems to be established (*Mempa* v. *Rhay*, 389 *U.S.* 128, 19 *L. Ed.* 2*d* 336 (1967); *State* v. *Seymour*, 98 *N.J. Super.* 526 (App. Div. 1968)), the decisions to date generally hold that there is no such right with respect to *parole* revocation proceedings. See *e.g. Johnson* v. *Stucker*, 203 *Kan.* 253, 453 *P.* 2*d* 35 (1969), *cert. den.* —— U.S. ——, —— *L. Ed.* 2*d* ——, 38 *U.S.L.W.* 3173 (Nov. 10, 1969).

The judgment is affirmed.

Opinion of the Superior Court of New Jersey

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-973-67

ANTHONY M. PUCHALSKI,

Plaintiff-Appellant,

vs.

NEW JERSEY STATE PAROLE BOARD,

Defendant-Respondent.

PER CURIAM.

This case raises the question whether Puchalski was entitled to the assignment of counsel at public expense to assist him in making a plea for parole. We hold he was not.

Puchalski is presently serving a sentence of 29 to 30 years at New Jersey State Prison for second degree murder. Sometime prior to December 1, 1967 he was notified that he was scheduled to appear at a meeting with the Parole Board in March 1968, to be considered for parole. On December 1, 1967, he wrote to the Chairman of the Parole Board requesting that an attorney be assigned "to represent my interests at the time I appear before the Board" and "to appear on the date in question." A similar letter was directed to the Public Defender. He was advised by letters that neither organization would provide counsel.

On January 9, 1968, an application was made to the Public Defender requesting that the Public Defender provide him with the limited representation allowed by *N.J.S.A.* 30:4-123.25—namely, consultation with counsel prior to the parole hearing and submission by counsel of a brief or other legal argument on his behalf to the Parole Board. It is stipulated that an application for the assignment of counsel also was submitted, pursuant to *R. R.* 1:12-9, and that he is indigent. On January 30, 1968, the Public Defender denied this request on the grounds that "the statute establishing the Office of the Public Defender does not authorize representation • • • of indigent defendants in connection with any proceedings involving the State Parole Board."

Thereafter Puchalski appeared before the Parole Board and parole was denied. His case was rescheduled for hearing in February 1970.

Puchalski does not contend that there is at present statutory or rule authority for assignment of counsel by the Parole Board or by any other agency to assist prisoners at parole hearings. Nor does he appear to contend that there is a constitutional or statutory right to be represented by counsel at a parole hearing. Rather, his sole contention appears to be that, since *N.J.S.A.* 30:4-123.25 affords a prisoner "the right to consult legal counsel of his own selection" prior to a parole hearing, the failure of the state to appoint counsel for an indigent prisoner for at least this limited purpose constitutes a denial of equal protection of the laws and due process of law under the Fourteenth Amendment.

In a series of cases dealing with the rights of indigent defendants on appeal, the United States Supreme Court

has held that the state must supply a transcript without charge to indigent defendants, where such transcript is needed for adequate and effective appellate review, and is available to those who pay a fee, *Griffin* v. *Illinois*, 351 *U.S.* 12, 100 *L. Ed.* 891, 76 *S. Ct.* 585 (1956); that such transcripts must be made available to indigents, without the intervention of a public defender, even on appeal of collateral proceedings such as denial of a writ of error *coram nobis*, *Lane* v. *Brown*, 372 *U.S.* 477, 9 *L. Ed.* 2*d* 892, 83 *S. Ct.* 768 (1963); *Gardner* v. *California*, 37 *U.S.L.W.* 4098 (U.S. Jan. 21, 1969); that filing fees may not be imposed where they would deny to the indigent criminal defendant review available to those who can pay, either by way of direct appeal, *Burns* v. *Ohio*, 360 *U.S.* 252, 3 *L. Ed.* 2*d* 1209, 79 *S. Ct.* 1164 (1959) or by way of collateral attack, *Smith* v. *Bennett*, 365 *U.S.* 708, 6 *L. Ed.* 2*d* 39, 81 *S. Ct.* 895 (1961); and that where a first appeal is granted to all defendants as a matter of right, the state must supply counsel for that appeal to indigent defendants. *Douglas* v. *California*, 372 *U.S.* 353, 9 *L. Ed.* 2*d* 811, 83 *S. Ct.* 814 (1963). See also *Harper* v. *Virginia State Board of Elections*, 383 *U.S.* 663, 16 *L. Ed.* 2*d* 169, 86 *S. Ct.* 1079 (1966) (holding the state's poll tax unconstitutional because of its necessary denial of the franchise to those unable to pay).

The cases dealing with criminal appeals rest largely on the reasoning, expressed in both *Griffin* and *Douglas*, that even though there is no constitutional right to appeal, once such right is granted by the state, it must be granted equally to all defendants regardless of their financial condition. There must be no discrimination against the indigent in his right to appeal; the "type" of appeal he gets

should not depend upon his ability to pay. *Douglas* v. *California, supra* at 9 *L. Ed.* 2*d* 814; *Griffin* v. *Illinois, supra* at 100 *L. Ed.* 898-899, 901; *cf. Gardner* v. *California, supra.*

Puchalski's argument is that this reasoning should be extended to a New Jersey parole hearing. *N.J.S.A.* 30:4-123.25 provides:

> "When it becomes necessary for a prisoner to appear before the board, either for the purpose of determining his fitness for parole or to afford him an opportunity to be heard as to revocation of parole, such hearing shall be conducted in accordance with the rules and regulations of the board, but the prisoner shall have the right to consult legal counsel of his own selection, *if he feels that his legal rights are invaded,* and *subject to the consent of the board* to submit in writing a brief *or other legal argument* on his behalf to the parole board, and to have the services of an interpreter at his hearing if such services are necessary. The board, however, may call before it such witnesses as it may deem necessary and proper and in order to compel their attendance, shall be vested with the power of subpoena • • •." (Emphasis ours.)

Thus, he contends that, to be even-handed and to avoid constitutional infirmity, the state must provide counsel for this consultative function, where a prisoner is unable to pay for it.

It should be noted that in the Supreme Court cases cited, particularly *Griffin* and *Douglas,* the Court rested its decision on both the equal protection and the due

process clauses of the Fourteenth Amendment, without clearly enunciating the standards by which each or both of these provisions was applied. Certainly not all disadvantages of the poor are denials of equal protection. Nor do all burdens under which the poor labor because of their poverty constitute denials of due process of law. The question becomes, under both the equal protection and the due process clauses, whether the particular "right" (or "privilege") is of such fundamental importance that it should not be denied anyone because of lack of funds. See *Discrimination Against the Poor and the Fourteenth Amendment*, 81 *Harv. L. Rev.* 435, 437-438 (1967); *Gardner* v. *California, supra.*

The question is, therefore, whether the aid of counsel in seeking a parole is of such importance that the state should be required to furnish counsel for this purpose to those who cannot afford to pay for it. It should be noted at the outset that the statute does not provide for the appearance of counsel *at* the hearing, although the board may permit such appearance if it wishes. Even the matter of consideration of a prisoner's brief is left entirely within the discretion of the Parole Board. Thus the most that the statute grants as a "right" is that a prisoner may consult with counsel prior to the hearing, and even then only where "he feels that his legal rights are invaded." This we construe to mean invasions which caused or contributed to his wrongful conviction or detention. By the same token, the brief contemplated by the statute must be one which deals with legal questions, not one which merely makes a plea of clemency. The fact that a right to consult counsel was provided for at all would seem to stem more from a desire to insure that if a prisoner needed legal advice he would not be prevented from receiving it,

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than from a desire to establish a right to consultation with counsel as a part of the hearing procedure.

While it is true that a parole hearing can determine whether a man will remain in confinement or be allowed a supervised freedom, the hearing is still essentially an administrative one concerning the effective operation of the correctional system. There is no adjudication of guilt or innocence, and ordinarily, no fact issues to be resolved such as would require the presence of counsel. Instead the Parole Board seeks to determine the likely effect upon society and the prisoner of his early release. Only if the Board is of the unanimous opinion (*N.J.S.A.* 30:4-123.19) "that there is a reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society," is the Board authorized to release him on parole. *N.J.S.A.* 30:4-123.14. Such predictions as to future behavior are necessarily quite subjective and leave the Board with a broad discretion in the grant or denial of parole. *Mastriani* v. *N. J. Parole Board,* 95 *N. J. Super.* 351, 355-357 (*App. Div.* 1967) and cases there cited. No testimony need be taken; the Board need not divulge to the prisoner the reports upon which it acts; and it is not required to inform the prisoner of its reasons for denying him parole. *Id.* at 356.

In short, under usual circumstances there appears to be no such need there for an attorney as there is up to the time of his conviction and his ultimate confinement. There is no contention here that the present case is in any way unusual.

In *State* v. *Seymour,* 98 *N. J. Super.* 526 (*App. Div.* 1968), the court followed the United States Supreme Court

decision in *Mempa* v. *Rhay,* 389 *U.S.* 128, 19 *L. Ed.* 2*d* 336, 88 *S. Ct.* 254 (1967), in holding that a defendant is entitled to counsel at a hearing to revoke probation, and to representation by the Public Defender at such hearing if he is indigent.

The Court in *Mempa* based its decision, that counsel must be appointed to represent an indigent at a probation revocation proceeding on its conclusion that, under the Washington statute there presented, such proceeding was in effect the imposition of sentence which had been "deferred" during the probation period. The Court noted that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," and that its decision in *Townsend* v. *Burke,* 334 *U.S.* 736, 92 *L. Ed.* 1690, 68 *S. Ct.* 1252 (1948) "might well be considered to support by itself a holding that the right to counsel applies at sentencing." *Mempa* v. *Rhay,* 19 *L. Ed.* 2*d* at 340.

The Court then considered the nature of the revocation of probation-sentencing procedure and found that counsel is needed at such proceedings to assist the convicted person "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence * * *" *Id.* at 341. "Even more important" to the Court was the fact that under Washington law certain rights could be lost if not exercised at this stage, including the right to appeal and the right to retract a guilty plea at any time up to sentencing.

The Court in *State* v. *Seymour, supra,* found the reasoning in *Mempa* applicable to a revocation of probation hearing under New Jersey law.

It should be noted, however, that in neither of these cases was mention made of proceedings to grant parole. The situation presented at the hearing to grant parole is readily distinguishable from the revocation of probation proceedings considered in *Mempa* and *Seymour*. In the former, a conditional freedom is being granted to a prisoner by an administrative board, based on a largely discretionary application of its expertise. The factors deemed important in *Mempa* have passed; sentence has already been imposed; the prisoner has had an opportunity to present evidence to a court, with the advice of counsel, as to its appropriate limits; and there are no substantial legal rights which the prisoner could waive by not exercising them at the parole hearing.

Moreover, in revocation proceedings—both as to probation and parole—there are usually specific factual allegations concerning the conduct of the probationer or parolee said to constitute a violation of probation or parole. An attorney could prove most useful, even essential, in defending against such allegations of misconduct—presenting contrary evidence or cross-examining adverse witnesses if necessary. There are no such issues here.

The refusal to assign counsel and the denial of parole are affirmed.